IN THE

Supreme Court of the United States

October Term, 1973

FEB 5

No. 73-1051

ANTHONY BRIGANDI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

Petitioner ANTHONY BRIGANDI seeks a Writ of Certiorari to review a determination by a justice of the Appellate Division of the Supreme Court of the State of New York, First Department denying an application for leave to appeal from an order of the Supreme Court, New York County, entered on October 5, 1973, denying an application to reduce sentence.

Statement of the Case

In the afternoon of November 18, 1970, the petitioner, Anthony Brigandi and his son Donald Brigandi, were found to have in their possession, stolen Apollo XII commemorative medals bearing the name "Medallic Art Company." Thereafter, petitioner and his son were arrested and indicted (1809-71) for two counts of criminal possession of stolen property in the first degree [N.Y. Penal La §165.50] and for one count of criminal possession of stolen property in the second degree [N.Y. Penal Law §165.45].

The trial commenced on January 19, 1972, and the petitioner was convicted of criminal possession of stolen property in the first degree [New York Penal Law §165.50]. Judgmnet was rendered on February 28, 1972, and Anthony was sentenced to a maximum of three years imprisonment and to pay a fine of $2000.

On January 16, 1973, the Supreme Court of the State of New York, Appellate Division, First Judicial Department affirmed petitioner's conviction. 41 A.D.2d 601 (1973). On June 6, 1973, the New York Court of Appeals unanimously affirmed his conviction without opinion. 32 NY 2 908 (1973). On November 19, 1973, this Court denied petitioner's previous writ of certiorari in which he argued that he did not freely and voluntarily consent to a seizure of medals from his stores.

On June 20, 1973, petitioner made a motion based upon his medical condition and on an improper accusation which accused him of being a "receiver of stolen property," to

set aside his sentence. New York Criminal Procdur Law §440.20. Aftr a hearing, the trial court denied the petitioners motion:

> "This defendant may not have a criminal record, but he knowingly purchased stolen property and influenced others to steal the property. His recalcitrant conduct before and after his conviction beyond a reasonable doubt, convinced this court that he learned nothing from this experience; that there was no showing that his conduct would change or that he saw anything wrong in what he did. It was only because of his background and age that the very lenient sentence was imposed."

Leave to appeal to the Appellate Division, as required by N.Y.C.P.L. 450.15 was denied on November 1, 1973 by Justice Capozzoli. Petitioner is presently incarcerated pursuant to the decision in the New York State Court of Appeals.

In the instant petition, petitioner seeks certiorari to the Appellate Division, pursuant to 28 U.S.C. §1257(3). In his petition he alleges that he was denied due process by not being permitted an opportunity, at the hearing, to refute statements made by the prosecutor that he was connected with "major criminals and organized crime."

ARGUMENT

The trial court was not empowered to set aside petitioner's sentence; in any event petitioner had an opportunity to contest the prosecutor's assertion that he was involved with "organized crime".

Petitioner erroneously argues that he was denied his right to confrontation by not being given an opportunity at the hearing to refute the prosecutor's hearsay statements concerning petitioner's involvemnt with "organized crime."

Initially, it should be noted that petitioner's motion on June 15, 1973, to set aside his sentence was based on two grounds: that his medical condition was serious due to fungus infection in both feet, and "that suggestions have been made without foundation, that he is a receiver of stolen prperty." These grounds do not come within any of those specified in §440.20 on the New York Criminal Procedure Law, which gives a court the power to set aside a sentence. This section accommodates only contentions of illegality and not claims of harshness or excessiveness. Moreover, §440.20(2) of the C.P.I. bars the sentence motion when the ground urged has been previously determined upon appeal. Here, petitioner argued the excessiveness of his sentence on his appeal to the New York Supreme Court, Appellate Division, First Department. Therefore, under no circumstances was the trial court empowered to set aside petitioners sentence and no constitutional issue is presented for this court to consider.

Furthermore, the hearing minutes discloses that petitioner initially raised the question of his connection with

"organized crime" and that he was given an opportunity to refute the statements made by the prosecutor in response to his initial allegation. Petitioner's counsel in requesting that the sentence be modified to a definite term of imprisonment of one year stated:

> "The defendant tells me that he has never previously been in conflict with the law, tha the has absolutely no connection with organized crime. He has no connection with any other criminal syndicate." (3)*

In response to this assertion, the prosecutor stated:

> "Your Honor, in respect to the activities of Mr. Brigandi, the People did not state, at the time of sentencing, certain factors which were within the knowledge of the District Attorney's office, but which have become public before the United States Senate Small Business Committee, which was investigating the reception of stolen property."
>
> "On May 2nd, 1973 Captain Thomas Kasane of the New York City Police Department appeared before that committee—and I was present, your Honor —and stated that Anthony Brigandi, or the Brigandis, were involved in receiving stolen property from what were known as the Pressure Vault Gang. The pressure Vault Gang were a group of criminals who specialized in stealing large gem deposits on the east side."
>
> "Mr. Brigandi was implicated as one of the persons. Corroboration was not obtained. An indictment was [not] obtained at that time."
>
> "In addition, your Honor—in addition—the defendant was alleged to have been involved in this receiving scheme with one person known as Jack Mace, also known as Jack Melish, who has been identified as

* Refers to the minutes of the hearing.

> the chief receiver of stolen property in the United States for organized crime."
>
> "As has been stated by most of the authorities on organized crime, Mr. Brigandi, or Mr. Mace, may not be the usual character or stereotype or organized crime people, but they act as the conduit for organized criminal elements." (9-10)

The sentencing court after engaging in a colloquy with defense counsel concerning the sentence and the evidence adduced at the trial, and after noting petitioner's general objection to the prosecutor's statement, denied the application to reduce the sentence because of petitioner's "recalcitrant conduct" (13-14). The court then refused counsel's request to "say one word to the court," stating:

> "I am not going to reduce the sentence under the circumstances. And as I told you, under the circumstances of this case, I told you I would not do it. And I think I also said—and I may also state on the record —I felt at the time of sentence, and still do, that this defendant deserved the sentence he got. Really, only out of consideration for you, Mr. Anolik, that I agreed to put it on the calendar." (16)

In sum, the record conclusively establishes that the prosecutor's statements were made only in response to the petitioner's initial raising of the issue, that the prosecutor's statement identified the source of his information and that such information was part of the public record, that petitioner was in fact given an opportunity after the prosecutor's statement to refute the charges, but only made a general objection to them, and that the sentencing court denied petitioner's application based solely upon his previous comments at the time of sentencing (where the court

discussed the evidence against petitioner and his subsequent conduct) and because of petitioner's continued "recalcitrant conduct."

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February, 1974